

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

CARMEN MELONE,

Plaintiff,

vs.

PAUL EVERT'S RV COUNTRY, INC.,

Defendant.

Case No. 2:08-cv-00868-GWF

**ORDER**

**Defendant's Motion for Judgment  
as a Matter of Law (#74)**

This matter is before the Court on Defendant's Motion for Judgment as a Matter of Law (#74), filed on August 19, 2010; Plaintiff's Opposition to Defendant's Motion for Judgment as a Matter of Law (#80), filed on September 5, 2010; and Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Judgment as a Matter of Law (#83), filed on September 17, 2010. The Court conducted a hearing in this matter on October 7, 2010.

**BACKGROUND**

Plaintiff Carmen Melone brought this action against his former employer Paul Evert's RV Country, Inc. ("Paul Evert's") pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. Plaintiff alleged that Defendant fired him from his job in violation of the Act because of his disability resulting from prostate cancer.

Following the completion of discovery, Defendant moved for summary judgment on the grounds that Plaintiff could not establish a disability within the meaning of the ADA as a matter of law. In opposition to the motion, Plaintiff argued that his impairments substantially limited him in performing the major life activities of manual tasks, sleeping, standing, walking and working. The Court held that Plaintiff failed to present sufficient evidence to show that he was substantially limited in performing the major life activities of working, manual tasks or sleeping. The Court

1 held, however, that Plaintiff had made a sufficient evidentiary showing that his physical  
2 impairments substantially limited him in the major life activities of walking and standing. *See*  
3 *Order (36)*. The Court's holding was based in significant part on Plaintiff's declaration and  
4 deposition testimony that he was "unable to walk or stand for extended periods of time (greater  
5 than 30 minutes)," (Pl. Decl. ¶ 8, Dkt. #30-3 at 2), and that after walking or standing for 30  
6 minutes, he needed to sit and rest until the fatigue receded and he regained his strength. (*Id.* at 40-  
7 41). *Order (#36)*, p. 15. As discussed herein, at trial, Plaintiff did not testify to these specific time  
8 limits on his ability to walk and stand.

9 The action was tried to a jury from July 19 to 22, 2010. Defendant orally moved for  
10 judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure at the  
11 conclusion of Plaintiff's case-in-chief and again before the case was submitted to the jury. The  
12 Court denied Defendant's oral motions. The jury thereafter returned a verdict in Plaintiff's favor  
13 and awarded him emotional distress damages in the amount of \$40,000.01. *Special Verdict (#64)*.<sup>1</sup>  
14 Defendant filed a renewed motion for judgment as a matter of law on August 19, 2010 on the  
15 ground that Plaintiff failed to show, as a matter of law, that he has a disability within the meaning  
16 of the ADA. Alternatively, Defendant argues that the evidence did not support an award of  
17 emotional distress damages or that the damages awarded by the jury are excessive. The following  
18 summary of the evidence focuses on these two issues.

19 Plaintiff was employed as a commission salesman by Defendant at its sales facility in  
20 Laughlin, Nevada from 2003 until March 16, 2007. The busy season for Defendant's business in  
21 Laughlin was from October to April. During this season the sales personnel were generally  
22 required to work seven days a week. Mr. Melone was diagnosed with prostate cancer in  
23 September, 2006. He underwent prostate removal surgery at the UCLA Medical Center on  
24 December 12, 2006 and was out of work until January 15, 2007. When Mr. Melone returned to  
25 work in January 2007, the salesmen were on a seven day work schedule. The schedule was

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27 <sup>1</sup> Plaintiff's claims for recovery of back pay and related compensation benefits was tried to  
28 the Court on September 1, 2010. The Court has reserved judgment on that portion of Plaintiff's  
ADA claim pending its decision on Defendant's motion for judgment as a matter of law.

1 changed to six days a week in the first week of February, 2007.

2 As part of his job, Mr. Melone was required to patrol the RV sales lot and go in and out of  
3 motor homes ("RVs") to look for potential customers and attempt to sell them motor homes. Mr.  
4 Melone testified that upon returning to work in January 2007, he had difficulty walking and  
5 standing. He explained that he had undergone a radical prostatectomy which involved an incision  
6 from his navel to his pelvis. He was not completely healed when he returned to work and he  
7 realized he should not be climbing steps into motor homes as much as he had been doing. Tr.-I  
8 68:19-25.<sup>2</sup> He testified as follows:

9 . . . I had problems standing because of the pain. I had problems  
10 walking. I had problems climbing into motor homes. And it -- it  
11 started out gradually, and then I also had general urinary problems.  
That was a whole separate issue and -- which required a separate  
surgery later. But I had problems urinating. Tr.-I 69:2-7.

12 Mr. Melone testified that he had the feeling of having to urinate and a burning feeling which  
13 became increasingly worse. Tr.-I 69:5-19. Mr. Melone also experienced fatigue. He testified:

14 I mean, I tired easily. I would say in the morning I did really well,  
15 and by the afternoon I was -- I was really tired. And I -- and I knew  
16 that I would not be able to go six days a week let alone seven days a  
17 week. Even on a six-day week schedule -- and I probably should  
have been working five days. I probably should have been working a  
little less than that. But I figured I would ask for five days. Tr.-I  
70:1-7.

18 Mr. Melone testified on cross-examination that following the surgery, his doctor had  
19 advised him to take it easy and stay off work for six weeks. Tr.-II 49:14-15. His doctor  
20 specifically told him not to do anything too strenuous. Tr.-II 62:21-23. Mr. Melone decided,  
21 however, to return to work a month after his surgery. Tr.-II 49:16-17. He acknowledged that his  
22 doctor did not place any restriction on him once he returned to work. Tr.-II 49:18-25.

23 Mr. Melone testified that like other salesmen, he used the company's computer, which was  
24 located in the showroom or office lobby, for both business and personal reasons. He testified that  
25 personal use was allowed. For business purposes, he used the computer to send photographs of

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27 <sup>2</sup> The transcriber separately numbered the transcript pages for each trial day, beginning with  
28 page one. The Court therefore refers to the transcripts with the designations "Tr.-I" and "Tr.-II" to  
reflect the transcript for the first and second day of trial.

1 motor homes to customers and to obtain information from the manufacturer(s). The company's  
2 business telephone was located next to the computer and he would answer the phone while using  
3 the computer. Mr. Melone testified that this allowed him to develop additional sales leads from  
4 potential customers who called in. Tr.-I 93:25-95:13. Mr. Melone testified that because "I didn't  
5 feel that well for walking around for long periods of time, I would spend my time in the computer."  
6 Tr.-I 95:16-17.

7 Mr. Melone testified that he told the sales manager, Tom Schmid, that he had trouble  
8 standing and walking. Tr.-II 54:25-55:7. He also told employees Gary Lee and Ron Henderson  
9 that he had problems standing and walking. Tr.-II 64:12-14. He told his doctor that he was having  
10 problems with fatigue and problems with pain and urination. Tr.-II 55:8-10. He also told the  
11 doctor that he had pain standing. Tr.-II 55:13. He indicated that the pain got better when the scar  
12 tissue healed. Tr.-II 55:18-20.

13 Mr. Melone testified that during the first week of February he asked Mr. Schmid for  
14 permission to work five days a week instead of six. Mr. Schmid responded that Plaintiff was not  
15 special and that everybody had to work six days. Tr.-I 73:19-24. Mr. Melone thereupon requested  
16 a letter from his doctor stating that he should only work five days a week. Tr.-I 74:1. In a  
17 February 6, 2007 email to the doctor's assistant, Mr. Melone stated:

18 My employer is currently requesting all sales agents to work 7 days  
19 per week thru February. I struggled with this in January. Could you  
20 please e-mail me a Doctor's note to only work 5 days per week thru  
February or until I finish my tests in March. I'm exhausted.

21 *Plaintiff's Exhibit "15."*

22 Mr. Melone also stated in the email that he was "urinating very frequently (every 2 hours &  
23 3+ times at night and have a weak stream." He inquired whether this was normal. *Id.*

24 Dr. Reiter signed a letter dated February 12, 2007 which stated: "This is to certify that Mr.  
25 Melone is under my professional care for prostate surgery. I have advised him not to exceed a 5  
26 day work week until his next follow-up appointment in March." *Plaintiff's Exhibit "16."* This  
27 letter was faxed to Paul Evert's RV on February 15, 2007. Mr. Melone retrieved the letter from the  
28 finance manager in whose office the fax machine was located. He told Mr. Schmid that he had the

1 letter and Mr. Schmid instructed him to put the letter on Mr. Schmid's desk, which Mr. Melone  
2 did. Tr.-I 76:8-20. Mr. Melone testified that nothing further happened after he put the letter on  
3 Mr. Schmid's desk. Tr.-I 80:1-6. Apparently, Mr. Schmid did not discuss the letter with him and  
4 Mr. Melone did not follow-up with Mr. Schmid to ask whether he could reduce his work schedule  
5 to five days.

6 Mr. Melone testified that in the early part of February, his urinary problems were not as  
7 severe as they later became. At the beginning of February, he needed to urinate every two hours.  
8 Later on, he needed to urinate more frequently. Tr.-II 52:2-18. Mr. Melone testified that his  
9 urinary problems continued to get worse after February 15, 2007. His urinary tract was closing and  
10 he went to UCLA Medical Center for a follow-up examination on March 14, 2007. During that  
11 visit, his doctor scheduled him for further surgery on April 24, 2007. Tr.-I 80:20-23. His pain  
12 and fatigue, and resulting limitations on his ability to stand and walk, however, remained the same.  
13 Tr.-I 80:12-17.

14 Mr. Melone returned to work on March 15<sup>th</sup>. Tr.-I 80:25-81:1. He informed Mr. Schmid  
15 about the scheduled surgery in April. Mr. Schmid did not say anything at that time. Tr.-I 82:11-  
16 83:17. When Mr. Melone came to work the next day, however, Mr. Schmid called him into his  
17 office, told him that he was no longer needed and terminated his employment. Tr.-I 84:2-6.

18 Mr. Melone was asked about the nature of his physical limitations after he was fired on  
19 March 16, 2007. He testified as follows:

20 I, you know, obviously after my scar, after my scar tissue started to  
21 heal, I started to feel better. I didn't have, you know, that pain.

22 It was a large scar. I had adhesions, and that is -- I have pain from  
23 that. I have, do you want me to say currently or in -- . . ." Tr.-I  
89:12-14.

24 Plaintiff's counsel thereupon went to a different topic and did not ask Mr. Melone to  
25 explain what his current condition was with regard to pain from the surgical adhesions.

26 At the time of his termination, Mr. Melone was still under the care of Dr. Reiter at UCLA.  
27 He subsequently changed doctors. At the time of trial, he was under the care of Dr. Yu of Seattle  
28 Cancer Care. Tr.-I 90:8-91:2. Mr. Melone was not on any cancer related medication at the time he

1 was fired. Tr.-I 91:5-8. He began taking Lupron, a hormone therapy medication, in November  
2 2007. Tr.-I 91:13-23.

3 Mr. Melone was asked on cross-examination to state the physical requirements of his job as  
4 an RV salesman. He stated that they were walking and standing, primarily. Tr.-II 45:23-46:4. Mr.  
5 Melone denied that he stayed in the lobby “so often” after the surgery or that he was in the lobby  
6 more than the other salesmen. Tr.-II 46:16-47:6. Following the surgery, Mr. Melone was not able  
7 to use his bicycle to ride around the RV sales lot. Instead, he used a golf cart when it was available.  
8 Mr. Melone testified that he would have to get off the golf cart to greet a customer and to climb  
9 into motor homes to see if customers were there. Tr.-II 47:12-20.

10 Mr. Melone testified that RV sales were “off,” i.e. low, in January to March 2007. Tr.-II  
11 66:17-23. Mr. Schmid told all the salesmen that they needed to sell more. Tr.-II 67:5-8. Mr.  
12 Melone also testified that Mr. Schmid told him: “You’re a way better salesman than what you’re  
13 doing.” He told Mr. Melone: “Your sales should be better than what they are.” Tr.-II 69:15-18.  
14 Mr. Melone agreed with these statements, but testified that he had limitations. He further  
15 explained:

16 I couldn’t walk. I was in pain going up steps. I know what my  
17 limitations are. The doctor said, “If you have any problems, just take  
it easy.” Tr.-II 69:24-70:1.

18 Plaintiff called Ron Henderson as a witness. Mr. Henderson was also a salesman at Paul  
19 Evert’s RV. He testified that during the last year or year and a half of Mr. Melone’s employment,  
20 they worked together as a sales team. Tr.-II 78:12-16. Mr. Henderson testified that Mr. Melone  
21 was sore from his surgery after he returned to work. He stated that Mr. Melone bought another  
22 salesman’s golf cart to use on the RV lot. Tr.-II 85:10-17. Mr. Henderson described the duties of  
23 a salesman at the RV lot as “an on-your-feet job.” The salesmen were required to cover the few  
24 acres of the sales lot and go from coach to coach. The job required quite a bit of walking and  
25 standing. Tr.-II 86:1-5. Mr. Henderson testified that following Mr. Melone’s surgery, he did  
26 much of the leg work for he and Mr. Melone in greeting customers and showing them in and out of  
27 coaches. Tr.-II 87:24-88:1. He did this because Mr. Melone “was a little bit sore from his  
28 operation and he wasn’t quite as physically able to go up and down coaches . . . for a period of

1 time there.” Tr.-II 87:3-5.

2 The parties stipulated in the joint Pretrial Order (#39) to the admission of a number of  
3 Plaintiff’s exhibits that would not generally be admissible over objection. Some of these exhibits  
4 provide additional information regarding the nature of Plaintiff’s physical problems and limitations  
5 following his return to work after the surgery and also after he was fired on March 16, 2007. In a  
6 June 12, 2009 letter or memorandum, Mr. Melone stated that when he returned to work at Paul  
7 Evert’s:

8 I was a different person. I was fighting a life threatening disease that  
9 stole my manhood. I was physically and emotionally damaged.  
10 While at work, I tried to stay focused and for the most part I did.  
11 And the records will show that I did above average but I could have  
12 done better if I hadn’t been going through physical and emotional  
13 trauma. It was something that only time would help.

14 *Plaintiff’s Exhibit “25.”*

15 According to a chronology that Mr. Melone prepared, he accepted a job offer with an RV  
16 sales company in Portland, Oregon on November 4, 2007. He also indicated that he worked RV  
17 sales shows on 19 days in January, 2008 and on 8 days in February 2008. *Plaintiff’s Exhibit “28.”*  
18 The chronology also states that his PSA (prostate-specific antigen) blood test level continued to rise  
19 after his surgery and after he was fired. According to a 2/26/08 entry in Mr. Melone’s chronology:

20 Dr. Daneshmand at OHSU ordered a CAT scan and bone scan and  
21 placed me on a 90-day course of Lupron hormone therapy. The  
22 doctor explained to me that I have terminal advanced prostate cancer  
23 and has now spread throughout my body and has to be treated  
24 systemically. It is no longer localized.

25 *Plaintiff’s Exhibit “28.”*

26 In a postscript to this entry, Mr. Melone further stated:

27 The Lupron has made me excessively fatigued and produced intense  
28 hot flashes also I am beginning to feel the effects of latent depression  
as a result of this disease and being fired from my job.

*Id.*

29 The chronology also stated that Mr. Melone worked a 3-day RV show in mid-March 2008.  
30 He stated in a postscript to this entry, however, that he was “[t]oo fatigued to work any more RV  
shows.” *Id.* He also stated in a 5/30/08 entry that he received another 90 day course of Lupron

1 medication which made him extremely tired. He reported being in bed all day, every other day, and  
 2 was experiencing intense hot flashes. He also stated that “[t]his entire affair has caused me to be  
 3 latently depressed. *Id.*

4 In regard to the emotional distress or anxiety that Mr. Melone experienced as a result of  
 5 being fired, he testified at trial as follows:

6 Like I said, when I got fired it was a big shock to me, because of the  
 7 other problems I was going through and then being fired, I had a lot  
 8 of emotional distress. I hid it really well. I don’t, you know, because  
 I didn’t want to get my wife upset, but I did have a lot of anxiety, had  
 a lot of sleepless nights. And it bothered me.

9 Tr.-I 106:6-11.

10 Mr. Melone also testified that his wife stated that he was getting real moody. Tr.-I 106:18-  
 11 19. Mr. Melone could not, however, identify any activities he was no longer able to participate in  
 12 because of his emotional distress. Tr.-I 106:24-107:9.

### 13 **DISCUSSION**

#### 14 **1. Applicable Standard On Motion for Judgment as a Matter of Law.**

15 The standard for granting a motion for judgment as a matter of law under Rule 50(b) of the  
 16 Federal Rules of Civil Procedure is set forth in *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 859 (9<sup>th</sup>  
 17 Cir. 2002).<sup>3</sup> The court can overturn the jury's verdict and grant such a motion only if “there is no  
 18 legally sufficient basis for a reasonable jury to find for that party on that issue.” *Id.*, citing *Reeves*  
 19 *v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149, 120 S.Ct. 2097, 2109-10 (2000). The  
 20 court may not substitute its view of the evidence for that of the jury. *Costa v. Desert Palace, Inc.*,  
 21 299 F.3d at 859, citing *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1227 9<sup>th</sup> Cir.  
 22 2001). Nor may the court make credibility determinations or weigh the evidence. The court,  
 23 instead, must draw all inferences in favor of the nonmoving party. *Id.*, citing *Reeves*, 530 U.S. at  
 24 150, 120 S.Ct. 2097 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91

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 26 <sup>3</sup> Because the Court reserved the equitable issue of back-pay and other compensation for  
 27 decision by the court, final judgment was not entered upon the jury verdict. Defendant filed its  
 28 motion 28 days after the jury returned its verdict and was discharged by the Court. Accordingly,  
 Defendant’s motion was timely filed under Fed.R.Civ.Pro. 50(b).

1 L.Ed.2d 202 (1986)). The court should also disregard all evidence favorable to the moving party  
 2 that the jury is not required to believe. *Costa*, 299 F.3d at 859. The Supreme Court has also stated  
 3 that “the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter  
 4 of law, such that ‘the inquiry under each is the same.’” *Reeves*, 530 U.S. at 150, 120 S.Ct. 2097,  
 5 citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S.Ct. 2505 (1986).

6 **2. Whether There Was Sufficient Evidence that Plaintiff Had a Disability Within**  
 7 **the Meaning of the ADA.**

8 The ADA requires private employers to provide reasonable accommodations to the known  
 9 physical or mental limitations of an otherwise qualified individual with a disability, unless the  
 10 employer can demonstrate that the accommodation would impose an undue hardship. *Toyota*  
 11 *Motor Manufacturing Kentucky, Inc. v. Williams*, 534 U.S. 184, 193, 122 S.Ct. 681, 689 (2002),  
 12 citing 42 U.S.C. §12112(b)(5)(A). The Act defines a “qualified individual with a disability” as an  
 13 “individual with a disability who, with or without reasonable accommodation, can perform the  
 14 essential functions of the employment position that such individual holds or desires.” *Id.*, citing  
 15 §12111(8).

16 “Disability” is defined as (A) a physical or mental impairment that substantially limits one  
 17 or more major life activities of such individual; (B) a record of such an impairment; or (C) being  
 18 regarded as having such an impairment.” 42 U.S.C. § 12102(2). Whether a plaintiff’s physical or  
 19 mental condition constitutes a disability under the ADA involves three inquiries: (1) whether the  
 20 condition is a physical impairment, (2) whether the life activities from which the plaintiff is  
 21 impaired amount to major life activities, and (3) whether the plaintiff’s impairment substantially  
 22 limits him from performing the identified major life activities. *Gribben v. United Parcel Service,*  
 23 *Inc.*, 528 F.3d 1166, 1169 (9<sup>th</sup> Cir. 2008), citing *Bragdon v. Abbott*, 524 U.S. 624, 631, 118 S.Ct.  
 24 2196 (1998).

25 The HEW Rehabilitation Act regulations define “physical impairment” as “any  
 26 physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or  
 27 more of the following body systems: neurological; musculoskeletal; special sense organs;  
 28 respiratory, including speech organs; cardiovascular; reproductive; digestive, genito-urinary; hemic

and lymphatic; skin; and endocrine.” 45 CFR §84.3(j)(2)(i) (2001). The Supreme Court has noted that the commentary accompanying the HEW regulations indicates that diseases or disorders such as cancer may constitute physical impairments. *Bragdon*, 524 U.S. at 633, 118 S.Ct. at 2202. Merely having an impairment, however, does not make one disabled for purposes of the ADA. The claimant must also demonstrate that the impairment substantially limits a major life activity. *Toyota*, 534 U.S. at 194, 122 S.Ct. at 690 citing 42 U.S.C. § 12102 (2)(A). In *Gordon v. E.L. Hamm & Associates*, 100 F.3d 907, 912 (11<sup>th</sup> Cir. 1996), for example, the court stated that the side effects that the plaintiff suffered as a consequence of his chemotherapy treatments for cancer may have qualified as physical impairments, but they did not substantially limit plaintiff’s ability to care for himself or to work.

The EEOC, by regulation, defines “substantially limited” as:

- i) Unable to perform a major life activity that the average person in the general population can perform; or
- ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j) (2001).

The regulations further provide that whether someone is substantially limited in a major life activity is to be examined using such factors as:

- i) The nature and severity of the impairment;
- ii) The duration or expected duration of the impairment; and
- iii) The permanent or long-term impact, or the expected or long-term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(i)-(iii).

While the Supreme Court does not accord the EEOC regulations the same level of deference that it accords to the Rehabilitation Act regulations, it considered the EEOC regulations in *Toyota* in determining the meaning of “substantially limited” under the ADA. *Toyota*, 534 U.S. at 197, 122 S.Ct. at 691. The Ninth Circuit also follows these regulations in construing the

1 meaning of “substantially limited.” See *Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166,  
2 1170 (9<sup>th</sup> Cir. 2008).

3 The HEW Rehabilitation Act regulations define “Major life activities” as “functions such  
4 as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing,  
5 learning and working.” 45 C.F.R. § 84.3(j)(2)(ii). *Toyota* states that the word “major,” as used in  
6 the phrase “major life activities,” means important. *Id.*, 534 U.S. at 197, 122 S.Ct. at 691. In  
7 *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1061 (9<sup>th</sup> Cir. 2005), the court stated that “[w]e  
8 have recognized that the illustrative list of major life activities requires the activity only to be of  
9 comparative importance and central to the life process itself, and it need not have a public,  
10 economic, or daily character. To be a major life activity, the activity need not be essential to  
11 survival, but rather of central importance to most people’s daily lives.” (internal quotation marks  
12 omitted).

13 The issue in *Toyota* was whether plaintiff’s carpal tunnel syndrome and bilateral tendinitis  
14 substantially limited her in the performance of manual tasks. The Court stated that in order for  
15 manual tasks to fit within the category of major life activities, the impairment must prevent or  
16 severely restrict the individual from doing activities that are of central importance to most people’s  
17 daily lives. The impairment must also be permanent or long term. *Id.*, 534 U.S. at 197-8, 122  
18 S.Ct. at 691. The Court further stated that when addressing the major life activity of performing  
19 manual tasks the central inquiry must be whether the claimant is unable to perform the variety of  
20 tasks central to most people’s daily lives, not whether the claimant is unable to perform the tasks  
21 associated with her specific job. In reversing the Sixth Circuit Court’s decision granting partial  
22 summary judgment to the plaintiff, the Supreme Court held that the court erred by disregarding the  
23 very type of evidence it should have focused on--plaintiff’s ability or inability to tend to her  
24 personal hygiene and to carry out personal and household chores. The Court stated that these are  
25 the types of activities that are of central importance to most people’s daily lives and should have  
26 been part of the court’s assessment in determining whether the plaintiff was substantially limited in  
27 performing manual tasks. *Id.*, 534 U.S. at 201-2, 122 S.Ct. at 693. The evidence showed that even  
28 after plaintiff’s medical condition worsened, she could still brush her teeth, wash her face, bathe,

1 tend to her flower garden, fix breakfast, do laundry, and pick-up around the house. Her medical  
2 conditions, however, caused her to avoid sweeping, to quit dancing, to occasionally seek help  
3 dressing, and to reduce how often she played with her children, gardened, and drove long  
4 distances. The Court held that these changes in plaintiff's life did not amount to such severe  
5 restrictions in the activities that are of central importance to most people's daily lives that they  
6 established a manual task disability as a matter of law.<sup>4</sup>

7 The Ninth Circuit holds that a plaintiff is not required to present comparative evidence or  
8 medical evidence to establish a genuine issue of material fact regarding the impairment of a major  
9 life activity at the summary judgment stage. *Gribben v. United Parcel Service, Inc.*, 528 F.3d at  
10 1170, citing *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1058 (9<sup>th</sup> Cir. 2005). In *Gribben*, the  
11 plaintiff was diagnosed with dilated cardiomyopathy and paroxysmal arterial fibrillation. The  
12 plaintiff testified that as a result of this condition, he became light headed, had difficulty  
13 concentrating and breathing, had chest pain when undertaking activities in extreme heat for  
14 extended periods of time, and had similar symptoms when lifting weight over 50 pounds. He was  
15 told by his cardiologist not to engage in certain activities more than 20 minutes at a time in  
16 temperatures above 90 degrees. *Id.*, 528 F.3d at 1168. The district court granted the employer's  
17 motion for summary judgment because the plaintiff failed to submit any evidence as to the abilities  
18 of an average person in the general population to participate in outdoor activities in the "Phoenix  
19 summer." In reversing, the Ninth Circuit stated that plaintiff's testimony regarding the  
20 significance of his impairment was sufficient to create a genuine issue of material fact at the  
21 summary judgment stage. In so holding, the court distinguished cases such as *Wong v. Regents of*  
22 *the University of California*, 410 F.3d 1052 (9<sup>th</sup> Cir. 2005), in which the nature of the impairment  
23 claimed by the plaintiff was implausible and therefore necessitated a higher evidentiary burden.  
24 *Gribben* further stated:

25 . . .

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27 <sup>4</sup> The Court declined to consider whether the district court's order granting summary  
28 judgment to the defendant employer should be reinstated because the defendant did not request  
that relief in its petition for certiorari. *Toyota*, 534 U.S. at 202-3, 122 S.Ct. at 694.

1 To determine whether the grant of summary judgment was  
2 appropriate, we must review the evidence of Gribben's alleged  
3 impairment. *Id.* at 1059. Gribben's cardiologist testified at his  
4 deposition that Gribben had nonischemic cardiomyopathy, and that  
5 when Gribben worked in the extremes of heat, he experienced  
6 shortness of breath, weakness and chest pain. The  
7 cardiologist also testified that Gribben could not do any heavy lifting  
8 or exertion for prolonged periods of time. Gribben asserted that as a  
9 result of this disability, he experienced "labored breathing," that he  
10 could not "be in heat for extended periods of time," and that he  
11 experienced dizziness, fatigue and difficulty concentrating. He  
12 testified at his deposition that he experienced labored breathing  
13 when he was anxious and when he exerted himself too much and in  
14 the heat. Gribben testified that he had labored breathing "on and off  
15 all the time" and that the labored breathing stopped him from doing  
16 work that required too much exertion such as jobs that require  
17 "loading or unloading trailers or sorting" or extended physical  
18 activity such as lifting. He also testified that his heart condition  
19 substantially limits his ability to walk, run, climb, pull, push, squat,  
20 bend, lift and breathe.

21 The court held that this testimony was sufficient to establish a genuine issue of material  
22 fact as to whether plaintiff's impairment was substantial and limited his ability to perform regular  
23 daily activities including breathing, thinking and physical activities in temperatures of 90 degrees  
24 or more.

25 In *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1058-59 (9<sup>th</sup> Cir. 2005), the court stated  
26 that while the plaintiff is not required to present comparative or medical evidence to establish that  
27 he is substantially limited by the impairment in performing a major life activity, he must present  
28 evidence in sufficient detail to convey the existence of an impairment. The court held that the  
29 plaintiff met that requirement. In so holding, the court distinguished *Fraser v. Goodale*, 342 F.3d  
30 1032 (9<sup>th</sup> Cir. 2003). The plaintiff in *Fraser* established through medical testimony that she had  
31 severe and life threatening diabetes. The court had no difficulty in concluding that diabetes  
32 qualifies as a physical impairment under the ADA. The court noted that under *Sutton v. United*  
33 *Airlines*, 527 U.S. 471, 491 119 S.Ct. 2139, 2151 (1999), the trier of fact is also required to  
34 consider whether the plaintiff's efforts to mitigate the disease constitute substantial limitations.  
35 *Id.*, 342 F.3d at 1038-39. (See also *Rohr v. Salt River Project Ag. Impr. and Power Dist.*, 555 F.3d  
36 850, 859 (9<sup>th</sup> Cir. 2009) ("if a person is taking measures to correct for, or mitigate, a physical or  
37 mental impairment, the effects of those measures-both positive and negative-must be taken into

1 account when judging whether that person is substantially limited in a major life activity and thus  
 2 ‘disabled’ under the Act.”)) The court found that plaintiff had presented sufficient evidence that  
 3 she was substantially limited in the performance of the major life activity of eating. The plaintiff  
 4 failed, however, to present sufficient evidence that she was substantially limited in the major life  
 5 activity of caring for one’s self. The plaintiff argued that when she was unsuccessful in obtaining a  
 6 proper blood sugar level, she could not properly care for herself. She described past difficulties in  
 7 bathing, walking, getting ready for work, driving and other such activities. The court stated,  
 8 however:

9 The problem is that Fraser does not show that these effects occurred  
 10 often enough to constitute a substantial limitation. While there is  
 11 evidence that Fraser is substantially limited in eating because of her  
 12 severe and demanding restrictions, there is no evidence that she is so  
 13 unsuccessful in monitoring her blood sugar levels that she is  
 14 substantially limited in caring for herself. *Accord Orr v. Wal-Mart*  
 15 *Stores, Inc.*, 297 F.3d 720, 724 (8th Cir.2002). In her brief, she  
 16 argues that she presented evidence that in mid-November 1998, in  
 17 February of 1999, and twice in March of 1999, she suffered insulin  
 reactions that severely limited her ability to care for herself. But  
 being unable to care for oneself four times during a five month  
 period is not a *substantial* limitation. She is not “significantly”  
 restricted in caring for herself as compared to the average person in  
 the general population. 29 C.F.R. § 1630.2(j)(1)(ii). *EEOC v. Sara*  
*Lee Corp.*, 237 F.3d 349, 353 (4th Cir.2001) (holding that one or two  
 nocturnal seizures a week and occasional daytime seizures do not  
 substantially limit plaintiff’s ability to care for herself).

18 *Fraser*, 342 F.3d at 1043-44.

19 In *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 724 (8th Cir. 2002), cited in *Fraser*, the  
 20 plaintiff also claimed that he was disabled within the meaning of the ADA because of his diabetes.  
 21 In support of his claim, the plaintiff stated that his diabetes substantially affected his ability to see,  
 22 speak, type, read, and walk. He also argued that “‘it would not be unreasonable to expect that [his]  
 23 diabetic condition *will* significantly disrupt his lifestyle.’” The plaintiff also contended that if he  
 24 failed to properly monitor and treat his condition, “‘he . . . ‘could experience’ adverse symptoms  
 25 which ‘*would* substantially limit [his] major life activity of working.’” *Id.* In affirming summary  
 26 judgment for the employer, the court stated that “[t]he Supreme Court in *Sutton* expressly ruled  
 27 that [a] disability exists only where an impairment substantially limits a major life activity, not  
 28 where it *might, could, or would* be substantially limiting if mitigating measures are not taken.

1 *Sutton*, 527 U.S. at 482, 119 S.Ct. 2139.” (internal quotation marks omitted.) The court stated  
2 that it was required to examine plaintiff’s present condition with reference to the mitigating  
3 measures taken and the actual consequences which followed. The court held that plaintiff failed to  
4 present evidence explaining how his diabetes substantially affected his major life activities or the  
5 duration and frequency of any limitations.

6 In this case, Plaintiff Carmen Melone was diagnosed with prostate cancer in September  
7 2006. No evidence was presented at trial that Plaintiff experienced any physical symptoms from  
8 the cancer, or was physically impaired by such symptoms, before undergoing prostate removal  
9 surgery in December, 2006. Following his surgery and return to work, however, Mr. Melone  
10 experience physical pain, urinary problems and fatigue as consequences of the surgery and, as he  
11 acknowledged, from probably returning to work too soon after the surgery. These consequences of  
12 medical treatment for a disorder or disease can also constitute physical impairments.

13 Mr. Melone testified that because of the pain from the surgical incision, he had difficulty  
14 walking, standing and climbing steps or stairs. He also had urinary problems which included a  
15 burning sensation and the need to urinate frequently. The urinary problem grew worse after Mr.  
16 Melone returned to work and ultimately led him back to see his doctor on March 14, 2007, at  
17 which time the doctor scheduled him for urinary surgery in late April to correct these problems.  
18 Mr. Melone also experienced fatigue. He testified that he did really well in the mornings, but  
19 became really tired in the afternoon. It is reasonable to infer from Mr. Melone’s testimony that he  
20 experienced these symptoms every day from the time he returned to work on January 15, 2007  
21 until he was fired on March 16, 2007.

22 Notwithstanding his symptoms and limitations, Mr. Melone testified that he was able to  
23 perform his job as a salesman by taking certain measures, including using a golf cart to traverse the  
24 RV lot, having Mr. Henderson assist him in dealing with customers and spending more time using  
25 the computer and answering customer telephone calls in the office. The one accommodation that  
26 Mr. Melone sought from the Defendant, and which was denied, was that he be permitted to work a  
27 five day week which would give him more time to rest. Mr. Melone’s trial testimony was vague,  
28 however, regarding the extent to which pain or fatigue limited his ability to walk and stand during

1 the period from January 15 to March 16, 2007. He did not testify as to what distance he could  
2 walk without having to stop. Likewise, he presented no testimony as to how long he was able to  
3 stand before he needed to sit or lie down. Nor did he describe to what extent he was able or unable  
4 to climb in and out of motor homes as part of his job duties.

5 Although Mr. Melone stated in his pre-trial declaration and deposition that he was unable  
6 to walk or stand for extended periods of time greater than 30 minutes, and that he would then need  
7 to sit and rest until the fatigue receded and he regained his strength, he gave no such testimony at  
8 trial. Even if Mr. Melone had so testified, it is debatable whether such testimony would have been  
9 sufficient to establish that he was substantially limited in the major life activity of walking or  
10 standing. *See Williams v. Excel Foundry & Machine, Inc.*, 489 F.3d 309, 311-312 (7<sup>th</sup> Cir. 2007)  
11 (plaintiff's testimony that he could not stand for more than 30 to 40 minutes at a time without  
12 briefly sitting or lying down to alleviate discomfort, and inability to balance on one leg did not  
13 constitute significant restrictions on activity of standing) and *Taylor v. Pathmark Stores, Inc.*, 177  
14 F.3d 180, 186 (3<sup>rd</sup> Cir. 1999) (plaintiff's ability to walk with a slight limp and stand for 50 minutes  
15 before being required to take a ten minute break did not constitute substantial limitation).

16 Mr. Melone's trial testimony was focused on how his impairment limited his ability to  
17 walk and stand in the performance of his job as an RV salesman. He provided no testimony as to  
18 how his limitations affected his ability to perform other activities of daily living, such as caring for  
19 himself, or performing household chores, yard work, grocery shopping, or engaging in social or  
20 recreational activities that involve walking and standing. *Toyota* stated that evidence regarding the  
21 plaintiff's ability to perform these types of activities, which are of central importance to most  
22 people's daily lives, should have been considered in assessing whether the plaintiff was  
23 substantially limited in the major life activity of performing manual tasks. *Toyota*, 534 U.S. at  
24 201-202, 122 S.Ct. at 693-94.

25 It is not always necessary, however, that a plaintiff present such testimony. In *Gribben*, for  
26 example, the plaintiff's description of his physical limitations related to his inability to perform  
27 physical work tasks. The court found that plaintiff's description of the nature and severity of his  
28 physical limitations was sufficient to create a genuine issue of material fact. Stated otherwise,

1 where the plaintiff shows that his impairment significantly restricts him in performing work-  
2 related physical activities, such as walking, it may be reasonable to infer that plaintiff is also  
3 significantly restricted in performing other activities of central importance to most people's lives.  
4 Mr. Melone's general and vague testimony, however, established only that he had some limitations  
5 in walking and standing while performing his work duties as an RV salesman. He failed to  
6 provide sufficient detail about his limitations, however, to support a reasonable inference that he  
7 was *substantially limited* in the ability to walk and stand as compared to the average person in the  
8 general population. Because he also failed to provide any information regarding limitations on his  
9 ability to engage in other activities, there was no alternative basis upon which the jury could have  
10 found that he was substantially limited in the ability to walk or stand.

11 The fact finder is also required to consider the duration or expected duration of the  
12 impairment, and its permanency or long-term impact. 29 C.F.R. § 1630.2(j)(i)-(iii). *Toyota*, 534  
13 U.S. at 198, 122 S.Ct. at 691. Mr. Melone testified that the pain he experienced from January 15  
14 to March 16, 2007 was caused by his surgical scar which had not yet healed. Tr.-1 68:19-25. He  
15 testified, however, that "after my scar tissue started to heal, I started to feel better. I didn't have,  
16 you know, that pain." Tr.-I 89:12-14. Mr. Melone did not provide any specifics as to when the  
17 scar tissue healed or what, if any, walking or standing limitations remained after the pain subsided  
18 and he started to feel better. While Mr. Melone appeared to testify that he still has some pain  
19 from "adhesions," he never described the extent of that pain.

20 Mr. Melone underwent the urinary tract surgery on April 25, 2007. According to his  
21 chronology, there was a two week recovery period after that surgery. *Plaintiff's Exhibit "28."*  
22 Plaintiff did not present evidence, however, as to whether his urinary problems remained or  
23 resolved after that surgery. It should also be noted that Mr. Melone did not testify that his urinary  
24 symptoms contributed to his problems with walking, standing or with fatigue. According to  
25 Plaintiff's chronology, he was advised on or about February 26, 2008 that his prostate cancer had  
26 now spread through his body and had to be treated systematically. He was thereafter placed on  
27 Lupron hormone therapy medication which made him excessively fatigued and caused intense hot  
28 flashes. While the evidence shows that Plaintiff's prostate cancer further progressed after March

1 16, 2007, he failed to present evidence that he was substantially limited in his ability to walk or  
2 stand between that date and late 2007 or early 2008 when he began a regimen of hormone therapy  
3 treatment.<sup>5</sup> The jury was again left to speculate about Plaintiff's physical condition and  
4 limitations, if any, during that period.

5 The Court therefore finds that Plaintiff failed to present sufficient evidence at trial that he  
6 was substantially limited in performing major life activities prior to the termination of his  
7 employment on March 16, 2007. Plaintiff also failed to present evidence that his physical  
8 impairments were permanent or of long-term duration, and not simply temporary impairments that  
9 he experienced while recovering from his prostate surgery. Nothing stated herein is intended to  
10 justify the Defendant's conduct in firing Mr. Melone. In order for liability to be imposed under the  
11 ADA, however, the claimant must prove that he is a "qualified individual with a disability." In  
12 this case, Plaintiff failed, as a matter of law, to show that he was disabled within the meaning of  
13 the Act.<sup>6</sup>

14 **3. Whether There Was Sufficient Evidence to Support the Jury's Award**  
15 **of Emotional Distress Damages.**

16 The foregoing decision on liability disposes of Defendant's alternative argument, first  
17 raised in its Reply Brief (#83), that the evidence was insufficient to support an award of damages  
18 for emotional distress or that the amount awarded by the jury was excessive. Generally, issues  
19 raised for the first time in a reply brief are considered waived. *Merrick v. Paul Revere Life Ins.*  
20 *Co.*, 500 F.3d 1007, 1013 (9<sup>th</sup> Cir. 2007), citing *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9<sup>th</sup>  
21 Cir. 1990). Plaintiff was not afforded the opportunity to oppose, in writing, Defendant's  
22 arguments on the damages award. The Court finds, however, that even if the damages issue is  
23 reached, the jury's damage award is supported by sufficient evidence and is not excessive.

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25 <sup>5</sup> Although Mr. Melone's chronology indicates that he began taking Lupron in or about  
26 February 2008, he testified at trial that he began taking Lupron in November 2007.

27 <sup>6</sup> Plaintiff did not allege in his complaint and presented no evidence at trial that he was  
28 regarded as disabled by Defendant. Nor did he raise this as a basis for affirming the jury verdict in  
his opposition to Defendant's motion for judgment as a matter of law.

1 Emotional distress damages are recoverable in a civil action for violation of the ADA.  
2 *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1285 (7<sup>th</sup> Cir. 1995).<sup>7</sup> There is no  
3 requirement in the Ninth Circuit that an award of damages for emotional distress be supported by  
4 objective evidence. *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9<sup>th</sup> Cir. 2003).  
5 The plaintiff's testimony alone may be enough to substantiate the jury's award of emotional  
6 distress damages. *Id.* The amount of damages should be reversed only if it is grossly excessive or  
7 monstrous. *Zhang*, 339 F.3d at 1040, citing *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9<sup>th</sup> Cir.  
8 1999) (en banc), *cert. denied*, 528 U.S. 1116, 120 S.Ct. 936 (2000). *See also Smith v. City of*  
9 *Oakland*, 538 F.Supp.2d 1217, 1240 (N.D.Cal. 2008).

10 In *Zhang*, the jury found that plaintiff was retaliated against and ultimately fired because of  
11 his Chinese ethnicity and nationality. The amount of emotional distress damages awarded to  
12 plaintiff was calculated as either \$223,155 or \$123,155. In upholding the award under either  
13 amount, the Ninth Circuit relied on plaintiff's testimony that his job at defendant's company was  
14 his "dream, working in this country," that when he was terminated, he was "troubled," and  
15 "couldn't believe" it. The plaintiff also testified that letters that the defendant sent to his suppliers  
16 about his termination made it seem like he was either a criminal or something bad, and hurt his  
17 dignity and reputation. The court stated that "the jury obviously could have gleaned that he was  
18 greatly hurt and humiliated by his termination and the manner in which it was carried out." *Zhang*,  
19 339 F.3d at 1040-41.

20 In *EEOC v. AIC Security Investigations, Ltd.*, which was decided in 1995, the Seventh  
21 Circuit upheld an award of \$50,000 in emotional distress damages to a plaintiff who was fired  
22 because of his terminal brain cancer. The court noted that "[t]he district court found that there was  
23 a rational connection between the evidence and the damage award." The plaintiff claimed  
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26 <sup>7</sup> Mr. Melone sought damages and other relief solely under the provisions of the ADA. He  
27 did not allege state law causes of action for intentional or negligent infliction of emotional distress.  
28 Defendant's arguments regarding the evidence required to prove the elements of these causes of  
action are therefore beside the point.

1 emotional distress damages for depression, rage and fear resulting from his sudden firing. The  
2 testimony showed that plaintiff's work was a very large part of his life, he took almost no  
3 vacations, and he sometimes put his company above his family. The evidence also showed the  
4 plaintiff's firing was emotionally wrenching, even though he underwent no formal psychological  
5 treatment. He was cut off from one of the major defining aspects of his life and he was forced to  
6 watch his family suffer emotionally and financially as well. In upholding the award, the Seventh  
7 Circuit further stated that "the emotional burden on a person dying of cancer, perceiving himself as  
8 unable to adequately provide for his family, is considerably greater than that suffered by the  
9 ordinary victim of wrongful discharge." *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d at  
10 1285-86. The Seventh Circuit further noted that it had previously upheld numerous similar  
11 awards in cases in which plaintiffs were fired in violation of other civil rights laws. The court  
12 specifically cited awards of \$40,000 and \$35,000. The court concluded by stating that  
13 "[u]ltimately, it may be that [plaintiff] did not really deserve as much as \$50,000, but that is not the  
14 question. The question is whether the award was grossly excessive, and it was not." *Id.* at 1286.

15 Mr. Melone's testimony regarding the emotional distress he experienced was, like his  
16 testimony regarding his physical limitations, sketchy. He did testify, however, that "when I got  
17 fired it was a big shock to me, because of the other problems I was going through and then being  
18 fired, I had a lot of emotional distress." Tr.-I 106:6-11. He added that he had a "lot of anxiety and  
19 sleepless nights." *Id.* Elsewhere, Mr. Melone stated that when he returned to work following the  
20 prostate surgery, "I was fighting a life threatening disease that stole my manhood. I was physically  
21 and emotionally damaged." *Plaintiff's Exhibit "25."* According to Mr. Melone, he had previously  
22 been one of Defendant's top producers. Even after he returned to work, he performed above  
23 average, but could have done better, but for the physical and emotional trauma he was  
24 experiencing. *Id.* Mr. Melone also stated in his chronology that several months after he was fired,  
25 he was "beginning to feel the effects of latent depression as a result of this disease and being fired  
26 from my job." *Plaintiff's Exhibit "28."*

27 Although the evidence of emotional distress is not as compelling as that in *EEOC v. AIC*  
28 *Security Investigations, Ltd.*, Mr. Melone was fired only two months after returning to work from

1 major prostate cancer surgery, and only one day after he told his sales manager that he would have  
2 to have another operation. The evidence also indicates that he was unemployed for a substantial  
3 period after he was terminated. The jury had sufficient evidence to conclude that Mr. Melone  
4 experienced significant emotional distress as a result of Defendant's conduct in firing him. The  
5 award of \$40,000.01 in emotional distress damages was not grossly excessive or monstrous.  
6 Therefore, the Court would uphold this verdict if the Plaintiff had presented sufficient evidence to  
7 show that he was disabled within the meaning of the Act.

8 **CONCLUSION**

9 Based on the foregoing, the Court concludes that there was no legally sufficient basis for a  
10 reasonable jury to find that Plaintiff was disabled within the meaning of the Americans with  
11 Disabilities Act prior to or at the time Defendant terminated his employment. Accordingly,

12 **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment as a Matter of Law  
13 (#74) is **granted**. The jury's verdict for Plaintiff is hereby set aside and final judgment shall be  
14 entered in favor of Defendant Paul Evert's RV Country, Inc.

15 DATED this 4th day of November, 2010.

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18 GEORGE FOLEY, JR.  
19 United States Magistrate Judge  
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